IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1077 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE N.G.NANDI
and
Hon'ble MR.JUSTICE RAVI R.TRIPATHI

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SHEHNAZABEN W/O HANIF HUSSAIN

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 1077 of 2002

MR RAJESH M AGRAWAL for Petitioner No. 1-3

MR ND GOHIL Ld. APP for Respondent No. 1

CORAM : MR.JUSTICE N.G.NANDI
and
MR.JUSTICE RAVI R.TRIPATHI

Date of decision: 23/07/2003

ORAL JUDGEMENT

(Per : MR.JUSTICE N.G.NANDI)

1. Heard Mr.R.M.Agrawal, learned advocate for the

appellants - convict and Mr. N.D.Gohil, learned APP for the respondent - State.

2. Vide order dated 7.2.2003, this appeal under Section 374 of the Code of Criminal Procedure has been admitted, and R & P of the case requisitioned from the trial Court has been placed before us.

3. By filing this appeal under Section 374 (2) of the Code of Criminal Procedure, the appellants have challenged the legality of the judgement dated 3.10.2002 rendered by the learned Additional Sessions Judge and Special Judge, Fast Track Court, Junagadh in Special Case No.139 of 1999 by which the original accused no.1 -Shenazben, wife of Hanif Hussain, original accused no.4 -Hanif Hussain Shaikh, and original accused no.5-Hussain Pirubhai have been convicted for the offences punishable under Section 20 (b) (ii) read with Section 29 of the Narcotic Drugs and Psychotropic Substances Act,1985 (hereinafter referred to as "the Act") and sentenced to suffer 10 years RI and fine of Rs.1 lacs and in default, 1 year RI.

4. The prosecution case shortly stated is that on 26.8.1999, at about 11:05 O'clock, PI Rana of "A" Division Police Station, Junagadh City was told by PSO that a telephonic information has been received from control room, Junagadh that in Junagadh City near Ghoghavav Pati one lady Shenazben, wife of Hanif Hussain, staying in a house on the left hand side in Ranima's Dela in her residential house, has been illegally keeping Charas and at present, there is stock of Charas in her house. Said information was noted down in the Station Diary and same was conveyed to Dy.S.P. in writing, whereupon the Dy.S.P. came to the police station and then panchas were called and along with the Striking Force, PSI Mr.Mehta, Police Staff Members and lady constable were apprised of the information received; that all of them were searched by eachother and after confirming that there was no intoxicant with them and taking the necessary instruments / things for sealing along with the police station seal, Preliminary Panchnama was drawn in the police station; that thereafter at 10:20 hours all of them came near Ranima's Dela near Ghoghavav Pati; that lady police constable Manajben first went inside Ranima's Dela and called Shenazben, whereupon one lady came out of her house; that she asked her name and she gave her name as Shenazben; that Divisional Police Officer Mr.Vasava gave his introduction as gazetted officer and Divisional Police Officer, and also gave introduction of Police Inspector, PSI and other police

staff members and panchas; that she was apprised of the information and in presence of panchas and Shenazben, her house was searched from inside and in a corner between cupboard and freeze from the folded mattresses in circle and semi-circle shape substance Charas was found along with other small pieces; the Charas found was got weighed through a person, who did the work of weighing and the same weighed 325 grams, and from the smell the substance smelt Charas; that two samples of 50 grams each were taken out from the recovered Charas; that on scrutiny the substance, prima facie, appeared to be Charas, whereupon the samples were separately packed and the seal of police inspector and "A" Division Police Station was fixed thereon; that the remaining muddamal was seized and sealed; that on further search from one bag, currency notes of Rs.6,200/- and scale and weights of 50 and 10 grams were found; that all these muddamal were recovered along with the electric bill suggesting name of Hussain Piru with the customer number with other details and telephone directory; that all these articles were seized in presence of panchas; that it was revealed by Shenazben that said muddamal was supplied by Raiya Somabhai Vaghri and Bharat Bhavangji, and that she was having business with them; that thereafter Shenazben was arrested; that PI Rana gave complaint about the incident and on the basis thereof, further investigation was handed over to PSI Gohil and PSI Vaji; that in the course of investigation, accused persons were arrested; that the muddamal recovered was handed over to PSO and thereafter, sent to the FSL for necessary analysis and report; that the report received from the FSL was kept on the record and according to the said report, the muddamal was Charas and thereafter, charge-sheet was filed against the accused persons for the offences under Section 20 (b) (ii) and 29 of the Act. The charge against the accused persons came to be framed vide Exh.10. The accused persons denied the charge levelled against them and claimed to be tried.

5. The prosecution in order to bring the guilt home adduced oral as well as documentary evidence. The further statement of the accused persons under Section 313 of the Code of Criminal Procedure was recorded. The accused denied commission of the offence under the Act as alleged. Appreciating oral as well as documentary evidence and considering the statements under Section 313 of the Code of Criminal Procedure, the learned trial Judge found 3 accused persons viz. original accused nos.1,4 and 5 - present appellants guilty for the offence aforestated and imposed sentence as aforesaid. It is this conviction recorded and sentence imposed which have

been challenged in the present appeal by the appellants.

6. We have heard the submissions advanced by learned advocate appearing for the appellants - convict and the learned APP for the respondent - State. We have also considered the evidence adduced before the trial Court.

7. It is suggested from the prosecution case as well as the impugned judgement of conviction that the appellant no.1 - original accused no.1 was residing with appellant nos.2 and 3 in the same home. The original accused no.4 and 5 are found to have possessed Charas weighing 325 grams for which they have been found guilty and sentenced above. It may be noted that original accused no.4 is the husband of original accused no.1 - Shenazben, whereas original accused no.5 is her father-in-law and father of accused no.4.

8. It is submitted by Mr.R.M.Agrawal, learned advocate for the appellants that the amended provision in Section 20 (b) (ii) (B) of the Act was not brought to the notice of the learned trial Judge as the sentence could be accordingly imposed for offences punishable under Section 20 (b) of the Act, looking to the quantity of 325 grams Charas proved to have been recovered from the house of appellants - convict. It is also submitted that new provisions of the Act were also not argued before the learned trial Judge canvasing that the minimum sentence would not be 10 years and fine of Rs.1 lac as imposed by the learned trial Judge in the impugned judgment and even if the offence is proved, the sentence may extend upto 10 years with fine which may extend upto Rs.1 lac. It is stated by Mr. N.D.Gohil, learned APP that in the instant case, the quantity of Charas proved to have been recovered from the house of the appellants is 325 grams.

9. Reading of the impugned judgement makes it clear that the learned trial Judge has proceeded on the footing as if there is no amendment in Section 20 of the Act which will have application to the facts of the present case on the point of sentence and as the learned trial Judge was inclined to impose minimum sentence as prescribed under the unamended provisions of Section 20 of the Act, the learned trial Judge has while imposing the sentence has observed that under Section 20 of the Act and looking to the provisions of Section 20(b) of the Act and the quantity of contraband Charas recovered, the minimum sentence would be 10 years RI and fine of Rs.1 lac and in default, further sentence.

10. Parliament has enacted Narcotic Drugs and

Psychotropic Substance (Amendment) Act,2001. The provisions of the amended Section 20(b)(ii)(B) provides that where the contravention relates to Sub-Clause (b) of Section 20 and the quantity involved is lesser than the commercial quantity but greater than small quantity, then the sentence would be rigorous imprisonment for a term which may extend upto 10 years, and with fine which may extend to Rs.1 lac.

11. As suggested from the evidence and from the impugned judgement, the quantity of Charas recovered from the house of appellants nos.1, 2 and 3 is 325 grams. It is suggested from the impugned judgement that the learned trial Judge has proceeded on the footing that the provisions of unamended Principal Act are applicable to the facts of the present case and, therefore, the learned trial Judge has not considered the provisions of the amended Act as the provisions of the amended Act were neither brought to the notice of the learned trial Judge nor argued before him on the aspect of quantum of punishment. It need hardly be said that the appellants are entitled to point out that the term of imprisonment should not exceed 10 years and that fine also should not exceed to Rs.1 lac, and it would also be open to the appellants to contend that looking to the facts and quantity of Charas in question which is proved to have been recovered would attract the punishment lesser than the maximum punishment together with fine as prescribed under Section 20 (b) (ii) of the Act.

12. Under the circumstances, we are of the opinion that in view of the amended provisions of the Act viz. Section 20 (b) (ii) (B) of the Act, the learned trial Judge cannot be said to be justified in imposing the minimum punishment as prescribed under the unamended Principal Act.

13. Having regard to the facts and circumstances of the case, we are of the view that interest of justice would be served if the matter is remanded to the trial Judge for considering the aspect of the quantum of punishment to be imposed on the appellants.

14. The appeal succeeds as indicated above. The decision on merits at this stage is not challenged by the learned advocate for the appellants and, therefore, the findings recorded by the learned trial Judge are not interfered with at all at this stage. The matter is remanded to the trial Judge, who shall consider the aspect of the imposition of sentence in light of the amended provisions of Section 20(b) (ii) (B) of the Act

and the circumstances which may be pointed out by the appellants regarding imposition of the sentence on them. It is clarified that after the fresh order is passed by the learned trial Judge imposing sentence, it would be open to the appellants to challenge the legality of the judgement including the merits of the case before the appropriate forum. The appellants shall be heard regarding imposition of sentence by the learned trial Judge as early as possible and without any avoidable delay, preferably within 3 months from the date of receipt of writ of this order. Appeal is accordingly allowed. The R & P of the trial Court be returned forthwith.

(N.G.Nandi,J.)

(Ravi R. Tripathi,J.)

(vipul)